JD(ATL)–10–15
Elgin, IL

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

OMNI COMMERCIAL LIGHTING, INC.

and **Case 13–CA–134425**

ANTHONY A. HOPKINS, An Individual

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 134

and **Case 13–CB–135163**

ANTHONY A. HOPKINS, An Individual

Christina Hill, Esq., for the General Counsel.
Scott A. Gore, Esq., for the Respondent.
Nicholas E. Kramer, Esq. for the Union.

DECISION

STATEMENT OF THE CASE

DONNA N. DAWSON, Administrative Law Judge. This case was tried in Chicago, Illinois on December 3–4, 2014. The Charging Party, Anthony A. Hopkins (Hopkins)[1] filed a charge against Respondent Omni Commercial Lighting, Inc. (Omni) on August 11, 2014 (Case No. 13–CA–134425). On August 21, 2014, Hopkins filed a charge against Respondent International Brotherhood of Electrical Workers Local 134 (the Union/Local 134) (Case No. 13–CB–135163). On October 20, 2014, the Region issued an order consolidating cases, consolidated complaint, and notice of hearing (the complaint). The complaint alleges that Omni violated Section 8(a) (1) and (3) of the National Labor Relations Act (the Act) when it discharged Hopkins because he asserted terms and conditions of his employment under a collective-bargaining agreement. It

[1] Charging Party Hopkins is also referred to throughout witness testimony as "Tony."

also alleges that the Union violated Section 8(b) (1) (A) of the Act because it unlawfully failed to process a grievance concerning Hopkins' discharge.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Omni, and the Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

Omni is a corporation with an office and place of business in Elgin, Illinois, and provides commercial lighting services to customers in the retail, commercial, and industrial industries. Omni admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It is further admitted, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

As admitted, I find that at all material times, Christina Chwala (Chwala), Omni's owner, and William T. Milbourn (Milbourn), Omni's general manager, have been supervisors of Omni within the meaning of Section 2(11) of the Act and agents within the meaning of Section 2(13) of the Act. Similarly, it is admitted, and I find, that at all material times, Paul Johnson (Johnson), the Union's business representative, is the Union's agent within the meaning of Section 2(13) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

1. Respondents Omni and IBEW Local 134

Since 2000, Omni has provided commercial lighting services to its customers. These services mostly include maintenance of commercial light bulb fixtures on poles in parking lots of shopping centers or malls using a cherry picker or bucket truck, repairing and replacing bad electrical parts inside light fixtures and underground wiring between two light poles; and sometimes putting up, taking down, and replacing light poles. When Chwala started Omni, she took over a signage business and/or its employees, and Omni was signatory to a "B" sign agreement (SA) with the IBEW Local 134.

The Union offers three types of collective-bargaining agreements to companies under which "B" maintenance electricians can work. One is the SA, which typically covers electricians who install, service, and maintain light fixtures affixed to commercial signage as one might see at a fast food restaurant or bank. The other two types are the "B" maintenance agreement (MA) and the "B" lighting maintenance agreement (LMA), and they are central to the dispute in this case. The MA covers the broadest range or scope of interior and exterior work, including but not limited to, maintenance, repair, replacement and care of "all electrical wiring, electrical appliances, and electrical equipment of any nature." This involves work related to refrigeration

systems, escalators, conveyors, private telephone systems, air conditioning systems, and other systems in post-construction facilities. This agreement actually refers to "B maintenance electricians." (GC Exh. 19).[2] The LMA is more limited in its scope, and covers work related to the maintenance and care of interior or exterior commercial lighting fixtures, with some emphasis on green technology retrofitting. The LMA refers to its "B" members as lighting technicians who "[i]nstall magnetic or electronic replacement ballasts . . . including wiring within the fixture; . . . replacement lamp holders and/or sockets including necessary wiring within a fixture including relocating sockets within a fixture;" and "[i]nstall replacement lighting circuit breakers when necessary." The LMA excludes, however, "reconfiguring of the existing lighting grid" and "alteration or reconfiguring to the existing circuits." (GC Exhs. 10 and 17, Attachment B; U. Exh. 2). In order of wage rates and some benefits (employer health and welfare, annuity, and pension contributions), the MA has the highest tier of wages and benefits most favorable to employees; the SA has the second highest tier, and the LMA has the third or lowest tier of wage rates and benefits. (Tr. 197).

Each of these types of agreements has an area-wide version that has been negotiated by the Union and employer/contractor groups or their associations. These area-wide agreements (and some major standalone agreements) are ratified by applicable Local 134 members (e.g., "B" electricians ratify "B" agreements). However, other (non-area wide) companies/contractors, such as Omni, may enter into one of these area-wide agreements by signing a standalone agreement with a union business representative, such as Johnson, without the need for ratification by the members.

Initially, the Union only represented one Omni employee, Mike Pytel (Pytel), under a SA with Omni, until sometime in 2009, when he was transferred to an "A" agreement, described as that covering "A" wiring electricians, on advice by the Union. As described below, Omni's SA subsequently expired, and Omni ultimately entered into a LMA with the Union. Omni's other electrician, Alan Wagner (Wagner), worked under a contract with another IBEW local–Local 174 to perform exterior signage and lighting maintenance work. (Tr. 117). There is no evidence, however, that Pytel's work changed after he transitioned to an "A" agreement. (Tr. 134–136, 153–155).

2. Wage and Benefits under the LMA and the MA.

Effective from July 1 through December 31, 2013, the wage rate per hour under the LMA was $26.36. From January 1 through June 30, 2014, the wage rate increased to $27.67 an hour. (GC Exhs. 17, Attachment D, and 7). In comparison, the wage under the MA from at least July 2013 through June 1, 2014, was $32.50. (GC Exhs. 6, 19). This wage rate increased to $33.50 under a newly ratified MA effective on June 2, 2014. There is no dispute that the fringe benefits under the MA, including the various pension and annuity plan contributions were about $4.00 an hour greater than those under the LMA.

[2] Abbreviations used in this decision are as follows: "Tr." For Transcript; "GC Exh." for General Counsel Exhibit; "R. Exh." for Respondent Omni Exhibit; "U. Exh." for Respondent Union Exhibit; "GC Br." for General Counsel's brief; "R. Br." for Respondent Omni's brief; and "U. Br." for Respondent Union's brief.

3. Charging Party Hopkins is hired by Omni and believes he is working under a MA.

On about August 14, 2013, Omni hired Charging Party Hopkins as a maintenance electrician. Omni employee Wagner, who had worked with him in the past, recommended him to replace Pytel, who was set to retire at the end of August. (GC Exhs. 2, 20). Hopkins shadowed Pytel before he retired on August 31.

When he applied and interviewed for the job with Omni, Hopkins worked for Nucore Electric (Nucore), where he had been employed since about 2010. He worked there as a "B" maintenance electrician and union card holder under the MA. In fact, he had worked in the same position under a MA since becoming a journeyman maintenance electrician while working for another electrical lighting company, Magun Electric (Magun), in about 2006. Hopkins assumed that Omni, like Nucore, maintained a MA with the Union, and that he would be working under it. His assumption was based on Chwala's agreement to pay him the same wage rate that he made at Nucore under a MA, and on his Local 134 history and membership as a "B" maintenance mechanic under a MA. During his interview, Hopkins was asked what salary he desired and which contract he worked under. He told Chwala that he wanted the $32.50 wage rate and the maintenance agreement (i.e., the MA) he worked under at Nucore. Chwala agreed, stating that "it would be fine with the maintenance agreement." (Tr. 33–34).[3] Hopkins also indicated on his application, submitted after his interview, that his desired salary was "134 contract $32.50," and explained that this was based on the pay scale for the "B" maintenance contract discussed in the interview. (Tr. 36; GC Exhs. 2, 20).

Subsequently, he also assumed that Omni maintained a MA with the Union because his work there was similar to the work he performed at Nucore. He admitted that at Omni he worked mostly on outdoor light fixtures and that at Nucore, he performed both indoor and outdoor lighting maintenance, but there is no dispute that at both companies, Hopkins maintained and repaired light fixtures. (Tr. 81–82).

Within two weeks after Hopkins began working at Omni, the Union's business representative, Paul Johnson (Johnson), called Hopkins to tell him that Omni did not have a current collective-bargaining agreement to cover him. Nevertheless, Johnson advised Hopkins to keep working while the Union negotiated a new contract with Omni. There is no evidence that Johnson mentioned in this initial conversation with Hopkins the type of agreement that Omni might sign.[4]

Shortly after November 8, 2013, Hopkins received a letter from the EIT benefits fund, informing him that his health and welfare benefits would terminate effective December 1, 2013. (GC Exh. 3; Tr. 40–41). Hopkins contacted Johnson, who told him that he did not have coverage

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[3] I credit Hopkins' testimony regarding what he was told during his interview. Although Chwala claimed that she did not "directly interview" Hopkins, she admitted that she was present "at times" during his interview, and agreed to pay him the same wage rate that he was making at Nucore. She neither admitted nor denied saying that "it would be fine with the agreement," and her General Manager, Milbourn, did not mention what was specifically said during the interview or that Chwala was not present during parts of the interview. (Tr. 150).

[4] At all material times in this case, all contact between Hopkins and Johnson or other union representatives was either by telephone, email, or letter mail.

because Omni had not yet signed a contract or secured the bond necessary to implement one. (Tr. 40–41). After his benefits expired on December 1, Chwala offered to pay for Hopkins' interim health expenses. (GC Exh. 4). Hopkins also recalled her mentioning that the Union had sent over the "wrong contract," and that she had to renegotiate and wait for an old bond to expire before obtaining a new one.[5] Next, Hopkins asked Johnson why his MA had not been signed, Johnson responded that he "[knew] what agreement goes in place." (Tr. 44).

In about mid-December 2013, Hopkin's health insurance was reinstated, and Chwala told him that Omni and the Union had finally executed a valid contract. (Tr. 140–141; GC Exhs. 5, 10; U. Exh. 2). Unbeknownst to him, Omni had become signatory to the LMA, and not the MA. He admitted that he never asked to see the agreement or asked what type of agreement was signed because he believed, for much the same reasons discussed above in connection with his hiring, that Omni and the Union would sign and had signed a MA such as he worked under at Nucore. His pay rate remained the same, and any resulting reductions in benefit contributions, which might have alerted him to a change in his wage and benefits package from what he received under the MA, were not reflected in any pay stubs or statements he received. (GC Exh. 20). In fact, Hopkins did not discover that Omni and the Union had entered into the LMA until June 2014.

Chwala, Milbourn, and Johnson claimed that Hopkins knew that Omni and the Union would be signing the LMA as early as late August/early September 2013, and had reviewed it and agreed with them that it was the best contract option for Omni. They also maintained that during that time, Johnson explained to Hopkins the details of the wage rates, benefits, and scope of work under the LMA versus the MA. According to Johnson, Hopkins was "fine" with the terms of the LMA as long as he continued to receive $32.50 an hour. Hopkins denied being shown any collective-bargaining agreements, or being included in any discussions about them or the LMA, at any time in 2013. For the reasons discussed below, I fully credit Hopkins' testimony over that of Chwala, Milbourn, and Johnson regarding his honest belief that he had been working under the MA.[6]

The evidence shows that in late August or early September, Chwala and other Omni representatives began to discuss with Johnson the type of maintenance agreement that would best suit Omni. Johnson recommended that the LMA was more appropriate. However, the correspondence between Chwala and the Union belies their assertions that Johnson sent Chwala copies of the LMA and the MA, which she in turn shared with Hopkins. Johnson sent Chwala a letter dated September 20, 2013, with three enclosed copies of the "Maintenance and Lighting Maintenance agreement between [Omni] and Local 134." However, a close read of this letter, along with an earlier email from Chwala, reveals that Johnson only referenced and attached three

[5] Chwala denies telling Hopkins that she had the "wrong contract," but admits that she had to wait for a bond associated with her former agreement to expire before obtaining a new bond and executing a new contract.

[6] Chwala's testimony was vague, evasive at times, and inconsistent with other evidence, including some of her own testimony. When asked if Hopkins provided any feedback or opinion about the agreements, she hesitated, and then responded that, "I assume he did. I don't know . . ." When asked again if Hopkins gave his opinion, she said, "No, not that I recall." (Tr. 138–141). When asked by the General Counsel on cross if she told Hopkins about the new agreement, she said that she was "aware of discussing or letting everybody know which agreement we had because we had been in negotiations for so long. I didn't keep it a secret." Even then, she was unable to say that she specifically told Hopkins that she had signed the LMA. (Tr. 162–163). Similarly, I discredit Johnson and Milbourn's testimony in this regard.

copies of one agreement, and asked Chwala to send back two signed copies to the Union's contract department, and to keep a third copy for her files. He also advised that a "fully executed copy" would be sent to her once all parties signed it.[7] (GC Exh. 21). In the email sent by Chwala to the Union two days earlier, entitled "Agreement and bonds," she referenced a telephone call with Johnson on September 17, during which she agreed to sign "the Lighting/Retro agreement instead of the sign agreement."[8] She also asked that a copy of the LMA be emailed to her for her review. No mention was made of the MA. Contrary to her testimony, this email shows that as of September 18, Chwala had already decided which contract to sign before she even saw a copy of the LMA, much less a copy of the MA. It is therefore unbelievable that she showed any agreements to Hopkins or sought his advice on them.[9] (U. Exh. 1; GC Exh. 17, Attachment C).

It is also implausible that Hopkins would have been "fine" with an agreement that likely would have precluded (future) significant raises above what he was making, and decreased his employer's annuity and pension contributions by almost $4.00 an hour.

In comparison, Hopkins' testimony was fairly straight forward and mostly consistent throughout. Therefore, I credit his testimony.

4. Hopkins finally discovers that the Union and Omni executed a LMA (and not a MA).

In May 2014, the Union, through its Business Manager, Terry Allen, sent Hopkins a letter stating that Local 134 and the Electrical Contractors Association (NECA) had negotiated the new MA, to become effective from June 1, 2014 through May 31, 2017. It recommended ratification of the agreement, with an attached business reply card by which Hopkins could indicate his acceptance or rejection of the new contract. The Union's letter also described how the MA's new wage and benefits package would increase by $4.68 over the life of the contract, and that on June 1, there would be a $1.44 increase in the first year, with $1.00 going to wages, and the rest going to health and welfare benefits. GC Exh. 6. Hopkins ratified the new MA. According to the Union, Hopkins and all other "B" maintenance electricians received this letter and vote card as card-holding "B" maintenance electricians—regardless of what contract their employers had signed. However, the receipt of this letter and opportunity to vote further bolstered Hopkins' belief that he was working at Omni under a MA, and would receive a raise pursuant to that contract. Shortly after June 1, Hopkins learned that his brother, another Local 134 member with another employer, had received his $1.00-per-hour wage increase under the new MA. Hopkins did not receive one.

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[7] Neither Omni nor the Union was able to provide the exact date on which they signed/fully executed the final LMA in December 2013, or produce a copy of it. Johnson, who was hesitant and evasive at first, finally (and reluctantly) admitted that there was one back in his office. The Union, did not, however, produce this copy in response to the General Counsel's subpoena.

[8] I also note that contrary to testimony, evidence shows that Chwala and the Union first signed a LMA much earlier than December 2013. (Tr. 148–150). The Union's position statement presented to the Board reveals that the LMA was fully executed in September 2013, but was backdated to August 2013 "to reflect the period that Omni . . . hired Mr. Hopkins and began performing work under the contract." (See GC Exh. 17, p. 2 and Attachment C, pp. 17–18).

[9] Milbourn's testimony was also inconsistent. He claimed that he did not discuss the LMA with Hopkins until June 2014, but then back-tracked, and said that he "[p]eripherally" talked to Hopkins about the LMA in 2013. (Tr. 168–170).

B. Hopkins' Termination

1. Events leading to termination.

On about June 9 or 10, Hopkins began to ask Milbourn why he had not yet received his $1.00 wage increase under the new MA. Milbourn in turn spoke to Chwala, and on about June 12, related her response that under the existing LMA between Omni and the Union, he (Hopkins) was already receiving a higher wage rate than required under LMA. At the same time, Milbourn gave Hopkins a copy of a one-page summary of the LMA wage rate and benefits package effective at the time—from January 1, 2014 through December 31, 2014.[10] (GC Exh. 7; Tr. 48–52). For reasons stated, I credit Hopkins' assertion that this is when he discovered that Omni and the Union had signed the LMA instead of the MA.

Next, Hopkins continued to question Omni management and Union officials about how and why he was working under the LMA instead of the MA as expected. He insisted that Omni and the Union had signed the wrong contract and requested that the Union resolve the matter on his behalf. On June 12, Hopkins called Johnson, who said that he would get back to him because he did not know what was in place.[11] On the same day, he emailed the Union, via Johnson and Business Manager Allen, telling them that the Union had signed a different agreement without notifying him. He claimed that the LMA was not the contract he should be working under, and asked them to respond in writing as to whether the benefits, pension, and annuities were the same under both contracts (the LMA and MA) since the wage rates were different. He also expressed his desire to work this out, but stated that he would not be "downgrading [his] card." In another June 13 email, he told Johnson that he was "very upset that [he had] to be fighting for [his] own contract." (GC Exh. 8). Hopkins admitted that he never produced additional documentation, requested by Omni to support his claim for higher wages and benefits, because he did not have any.

Johnson called Hopkins on June 17 to explain that Omni was signatory to the LMA, under which the scope of work was "anything inside of a light fixture," and that Hopkins was already making more than the LMA called for. Hopkins disagreed that the work he performed at Omni was limited to the light fixture itself, and asked for a copy of the LMA.[12] After this conversation, Johnson sent Hopkins an email with an attached copy of the LMA, and its new wage and benefits package summary effective July 1, 2014 through December 31, 2014. (GC Exs. 9–10). Hopkins responded via email, with a copy to Don Finn, the Union's business representative/Recording Secretary, that he believed that the Union and Johnson knew that he was a "B" maintenance electrician, and that a MA should have been put in place. Hopkins also asked for a copy of the MA so that he could compare the two contract packages. He also hoped and noted that Omni would "possibly pay the difference." (GC Exh. 9). Hopkins also sent a separate email to Finn later that day, asking for a copy of the MA. (GC Exh. 27).

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[10] Milbourn did not recall giving Hopkins this document, but Chwala corroborated Hopkins' testimony that he did.

[11] I believe this was Johnson's response since Johnson admitted that he received a multitude of calls and emails from his members every day, who apparently worked under different Local 134 contracts.

[12] I credit Hopkins' testimony, over that of Johnson's, regarding the substance of their telephone discussion on June 12, and his next telephone contact with Johnson on June 17.

2. Hopkins's termination on June 18.

There is no dispute that at the end of the workday on June 18, Milbourn approached Hopkins to discuss Hopkins' questions and concerns about the LMA. Milbourn told him that Johnson had confirmed that he could perform the work under the LMA, and that he was making $4.00- per-hour less in annuity contributions than he made with Nucore under the MA. Hopkins agreed that he was capable of performing work set forth in the LMA, but voiced his concern that the work he was doing at Omni was outside the scope of work set forth in the LMA. He told Johnson that he wanted the higher wages and benefits to which he believed he was entitled under the MA. Hopkins next suggested that he, Milbourn, and Johnson "talk about it," but Milbourn insisted that Chwala would not change the contract, and told him that, "if you want to find another job, you can." Before he could respond, Milbourn said, "[y]ou know what, you're fired. Give me your phone." He then told him to get his work tools out of his truck, which he did.

That same afternoon, Hopkins emailed Chwala that he had talked to Milbourn after completing his service calls, and that he was not sure what "went wrong but [Milbourn] ended the conversation by telling me to go home and that I'm fired." Hopkins said that [Milbourn] had not given him a reason for terminating him, and that he wanted to continue working for Omni. Chwala responded the next morning that "[r]egarding yesterday's situation, I support Bill [Milbourn] in the decision he had to make. Your check will be delivered today via courier. Unfortunately, it seems the Company and you were not on the same page." (GC Exh. 11). She did not give any other reason for Hopkins' termination.

The next morning (June 19), Hopkins called Johnson and told him that he had been fired. Johnson told him to call him back at 2:30 p.m. because he wanted to make some calls. When he called back that afternoon, he had to leave a message. He did not hear back from Johnson that day. At about 11:44 a.m., on the same morning, Hopkins sent Johnson an email referencing his intent to call him back that afternoon per their conversation earlier that morning. He also wrote that he wanted to file a grievance against Omni for letting him go without any warning, making him work outside the scope of the LMA, and for any benefits owed to him. (GC Exh. 12).

Milbourn, on the other hand, gave a very different account of what transpired on June 18. He testified that Hopkins became "very excited" when he learned that he made less in annuity contributions than he had at Nucore. He said that Hopkins began to yell and curse, accusing the "fucking union" and "fucking Christina" of "screwing [him]" and of lying and "cheating [him] out of money," and insisted that he was not "going to work for less than [he] made before." According to Milbourn, it was at this point, due to Hopkins' behavior and comment that he would not work for less, that he said, "Okay. We're done then," and collected Hopkins' keys, phone, and credit card. Milbourn contended that, "[i]t felt like he was asking to quit honestly." (Tr. 172–173).

Milbourn also emailed and then talked to Johnson the next day (June 19). (GC Exh. 25). During his telephone conversation, Milbourn gave Johnson his "full rundown of exactly how it transpired," referring to his encounter with Hopkins on June 18. Johnson then "reminded [him] that Mr. Hopkins might want to go on unemployment, so [they] wrote a letter to Mr. Johnson [on

June 25] stating that he [Hopkins] was laid off so he could possibly get his unemployment." (R. Exh. 2). In his email account to Johnson at 10:24 a.m. on June 19, Milbourn stated that:

> *Paul: I thought I should fill you in regarding Tony [Hopkins].*
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> *Yesterday afternoon I took Tony aside and relayed to him (again) that we thought that he was under the correct agreement. I reminded him that you had informed him of that last August—and that we (Omni) had no reason to change anything. Tony became very excited and accused us and Local 134 of misleading and lying to him, regarding the 4.00 discrepancy in his annuity contributions. I told him (again) that his previous agreement with Nucore had no relevance with our current agreement with you.*
>
> *Unfortunately, he continued his rant—and I decided at that time to sever our relationship. His check is being couriered to him right now.*
>
> *Sorry for the news—and hope you don't have further issues with him."*

(GC Exh. 25).

On June 20, Chwala sent an email to Johnson thanking him "for help with this matter," and attaching a detailed "account of the past few weeks with Anthony Hopkins" prepared by Milbourn and entitled "Chronology of Anthony Hopkins/Laid off June 19, 2014." In his written rendition of events, Milbourn stated that Hopkins began coming to him on June 9 or 10 asking for a $1.00 increase in his wages due him, as well as an extra $1.00 for ruining his clothes at work. On subsequent days, he complained that he was losing "thousands and thousands of dollars" because of the differences between the LMA and the MA he had at Nucore. He claimed that at about this time and after, he heard from other employees that Hopkins had been complaining to them that Omni and the Union were misleading and cheating him. (GC Exh. 26; Tr. 178). He contended that by about June 13, Hopkins had become "very uncommunicative and seemed very moody and angry," which was in contrast to his former "informal and friendly" manner. Finally, Milbourn explained that:

> On Wednesday afternoon (18th) I took Tony aside and related that we had talked to Mr. Johnson- and that Omni and Mr. Johnson concurred that we had the correct agreement in place. Mr. Johnson recalled telling Tony explicitly (August 2013) what the parameters of his new agreement were. I also related to Tony that we had been informed that the annuity contribution was 4.00 less than what he had at Nu-core…Tony became very agitated when this was related to him and began calling Paul Johnson a 'f****** liar' and that he and Omni had deceived him and tricked him into agreeing to the new contract. He also screamed that he would 'sue Paul Johnson.'…[and] that there was 'no way that he would work for less than he had been receiving at Nu-core'…Tony continued his yelling and I cut him off at that point—and told him that his services were no longer required at Omni Lighting.

(Id). Milbourn concluded that "[t]here had been no intent prior to this, to layoff Tony- so his final check was messengered to him the following morning . . . [a]t this time (June 19, 2014) Omni Lighting Inc. has opted to reduce its' work force until further notice." (Id.). [13]

I also resolve the factual dispute between Hopkins on the one hand, and Union and Omni officials on the other, regarding his termination in Hopkins' favor. His testimony was more direct and consistent with the evidence as a whole than that of Milbourn, Chwala, Johnson, and Omni's nonsupervisory witness (Wagner) (see below). In contrast, their testimony was evasive, contradictory, and largely self-serving.

In Milbourn's June 19 email to Johnson, he failed to mention Hopkins' use of profanity, refusal to work for less money, or his belief that Hopkins had essentially resigned. (GC Exh. 25). Not until his chronology sent by Cwhala on June 20 did he mention Hopkins' alleged unsatisfactory or angry manner prior to June 18 or Hopkins' use of profanity, screaming, and threat to sue Johnson. (GC Exh. 26). He also failed to mention these incidents in the termination letter, dated June 25, that he sent to Johnson (see below). Similarly, Chwala did not mention these incidents or Hopkins' progressively angry behavior in her email to Hopkins denying his request for reinstatement or in her testimony. Moreover, Milbourn never mentioned in his detailed account that Wagner was present and a witness to at least part of Hopkins' alleged "rant" and refusal to continue working for less (discussed below). He could not recall if he had one or two conversations with Johnson, but believed it was an email and one conversation on June 19. (Tr. 175–176). On cross-examination, Milbourn denied that he terminated Hopkins because he questioned his contract, or because he believed Hopkins accused him of lying and cheating, but on the other hand, admitted that Hopkins "made [him] angry when he said that he didn't want to work for us if he wasn't going to make the same money as before and we couldn't change that." (Tr. 179–180).

Milbourn's June 25 notice of termination that he sent to the Union, but not Hopkins, stated:

> This letter is written to inform Local 134 of the decision by Omni Commercial Lighting Inc. to sever their relationship with Mr. Anthony Hopkins.
>
> Anthony is a B card 134 lighting electrician- and had been employed by Omni since August of 2013.
>
> On June 18th, 2014—Omni made the decision to reduce its' workforce and Mr. Hopkins was notified that his employment was no longer needed.
>
> Mr. Hopkins did not seem to enjoy his employment with Omni and displayed a rather poor work ethic.

[13] When asked if he told Johnson, in his June 19 email that Hopkins would be laid off in order to receive unemployment benefits, Milbourn answered, "[n]o not at all. We laid him off because we were a little short of work at that point which was the case." I do not credit Milbourn's belated testimony that Hopkins was let go due to a work shortage. This is not evident in his June 19 email and his written statement sent to Johnson on June 20. (Tr. 173–174).

(See GC Exh. 17, Attachment; R. Exh. 2). There is no evidence that anyone at Omni told Hopkins on June 18, or at any other time, that a "reduction in the workforce" was the reason for his termination.

Wagner, who worked at Omni with Hopkins, first testified that he was present for about the first 10 minutes of the discussion between Milbourn and Hopkins on June 18, and heard Hopkins say that "he would not work for less money, that who work[s] for less money." He then said that he left Milbourn and Hopkins to go to another area in the facility which was about 20–30 feet away, and did not see or hear anything else said, except "voices [emphasis added] being very loud." He admitted that there was no background noise, but also that he never heard Hopkins use any profanity with or directed toward Milbourn or anyone else. In fact, it was only when led by the Union's counsel, did he testify that it was "mostly Mr. Hopkins' voice," that was loud, and that Milbourn "was more, you know mellow tone, calm down." (Tr. 117–123).[14] I doubt that Wagner was present with Hopkins and Milburn during any part of their conversation. Milbourn never mentioned Wagner's presence during his conversation with or email to Johnson on June 19, his detailed account of events emailed to Johnson on June 20, or in the termination notice sent to the Union on June 25. Rather, he said that he "took Tony aside." (GC Exh. 25). Furthermore, if Wagner left Milbourn and Hopkins to go 20–30 feet away, allegedly close enough to distinguish Hopkins' raised voice from Milbourn's "calm" tone, I believe that he would have also heard Hopkins if he had screamed expletives as claimed by Milbourn.

According to Johnson, Hopkins called him on June 18 to tell him that he was "being let go, that they took his keys, they took his truck and that he was being discharged from Omni Lighting." When asked further about what Hopkins specifically told him, he said Hopkins mentioned the "wrong contract," and questioned "how could this happen to him." These are the only details that Johnson provided, which are fairly consistent with Hopkins' testimony that he did not get a chance to go into details with Johnson about his termination. Johnson also testified that he told Hopkins that, "it sounds like you're being discharged for just cause," and that he would contact Omni to see what happened, which is interesting given the fact that Hopkins had not given him any details and he had not yet talked to Milbourn. (Tr. 223).

Further, Johnson's account of his first conversation with Milbourn after Hopkins' discharge was not entirely consistent with Milbourn's.[15] He related Milbourn's reasons for letting Hopkins go, and Milbourn's claim that, "there was a lot of yelling and screaming that went on and that he was going to let him go for insubordination, just cause."[16] (Tr. 224–226). However, he subsequently admitted that he was the one who told Milbourn that Omni had just cause for terminating Hopkins for insubordination, in addition to recommending that Omni lay

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[14] Wagner also related that Hopkins told him that Johnson "does nothing to help the union members," and that he (Hopkins) "was not happy with Mr. Johnson or 134 in the whole." He did not, however, specify when Hopkins shared these feelings with him. This testimony was not inconsistent with Hopkins' testimony that he spoke to him about his situation after his discharge, and not on June 18. (Tr. 132).

[15] Johnson also insisted, as he did regarding Hopkins, that he talked to Milbourn numerous times between June 18 and 19. Milbourn recalled that he only spoke to Johnson about Hopkins' discharge once or twice.

[16] Johnson wavered considerably in his testimony regarding whether Milbourn discharged Hopkins on June 18 or was still deciding to do so on June 19, but Milbourn and Chwala made it clear that Hopkins was discharged on June 18. (Tr. 229–230; GC Exh. 11, p. 1).

off rather than terminate Hopkins so that Hopkins could receive unemployment benefits.[17] It was not until he was later asked by Omni's counsel what else he did to try to resolve the matter, that he suddenly recalled that he asked Milbourn if he would give Hopkins his job back. (Tr. 238). I do not believe that Johnson, who so quickly insisted that Milbourn was justified for firing Johnson for insubordination, actually tried to get him to reinstate Hopkins.

C. The Union Refuses to Pursue a Grievance on Hopkins' Behalf.

By letter to Local 134 dated June 20, Hopkins made another request that a grievance be filed against Omni for "wrongful termination." He also added that after his termination, he was not given a paycheck until the next day, and pursuant to article VII, was not paid for "10 paid days of wage and benefits" owed by Omni. On June 24, Hopkins sent yet another email to Johnson, with a copy to Finn, stating his belief that Omni owed him 10 days pay for letting him go without warning, and asking Johnson to "please get back to [him] with an update" on the grievance process. (See GC Exh. 12, p. 1). Hopkins recalled that he wrote, "termination/layoff" in these letters because he believed it was the language used in Article VII of the MA, and not because he knew at the time that he had in fact been let go due to a reduction in force. Although this MA section immediately follows an article that discusses termination, it does not use the words, "termination/layoff." Instead, it states that an employer must pay an employee "ten (10) days' pay" who was not given "at least ten (10) working days'" advance notice that he was to be "laid off." (GC Exh. 19, MA article VII).[18]

On July 1, Johnson, on behalf of the Union, finally responded to Hopkins' numerous emails. He advised him for the first time about Omni's notice of termination due to layoff/reduction in force, and of his review of the LMA, which did not contain a provision that he would receive 10 days of pay. He finally advised that, "[t]his concludes this issue."[19] (GC Exh. 13, p. 1).

By letter (and email) dated July 9 or 10, Hopkins wrote to Allen regarding "Lack of Representation per Contract," and informed him about the Union and Omni signing the LMA without his knowledge, his not receiving a reason or notice about impending layoffs, and working outside the scope of the contract. He felt the "unsupportive nature and lack of representation for [him] as a member to be quite alarming," as well as the Union's failure to try to get him back to work. He also expressed concern that, "this is happening not only to me but potentially others as well." (GC Exh. 14, pp. 1–2). On July 30, Hopkins also sent a similar

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[17] Hopkins admitted that he ultimately received unemployment benefits, but there is no evidence that he was told on June 18 or 19 that he was let go due to a reduction in force or layoff. In fact, I credit his testimony that he was not given a reason for his layoff other than what was in Chwala's June 19 email.

[18] In light of the many contradictions in Respondents' witnesses' testimony, this inconsistency does not diminish Hopkins' overall credibility. Hopkins' use of "termination/layoff" in late June does not lead me to conclude that he believed that he had been laid off at the time, as opposed to terminated. Nor does it mean that Johnson, as he claimed, told him about the layoff, or any other reason, for his discharge prior to July 1.

[19] Johnson testified that he did not include Hopkins' insubordination and "aggressive" behavior in this email because he wanted to provide him with documentation he could use to obtain unemployment benefits. (Tr. 233–234). Johnson also testified (and claimed) for the first time that Hopkins had gotten angry with and cursed at him during an unspecified conversation, in which both of them used profanity with each other. (Tr. 227, 250).

email to Lonnie R. Stephenson (Stephenson), International Vice President of the IBEW Sixth District Office. He added that he wanted to handle the matter internally with the Union's cooperation, but also asked that a grievance be filed against Local 134. (GC Exh. 14, p. 3).

On September 2, Hopkins sent the Union's officials two more emails asking for an update and report on his grievance and documentation of Omni's reduction in force. He also informed them that Omni had hired someone from Local 701 to replace him. (GC Exh. 15). Finn finally replied on September 2, confirming that Johnson's July 1 email had concluded the grievance process. He also informed Hopkins that the reason for his discharge was a reduction in force, and that, "per our agreement it is not something that a grievance can be submitted on." (GC Exh. 15). In stark contrast, Johnson testified on cross-examination that a reduction in force "was grievable . . . you can grieve a layoff if you need to." (Tr. 245).

On September 3, Union attorney Karen Rioux (Rioux), reconfirmed the Union's decision that a grievance would not be filed on his behalf. (GC Exh. 16). She explained that,

> [Y]ou became engaged in an argument with Manager, Bill Milbourn, regarding your belief that you were entitled to a wage raise negotiated under a contract to which Omni is not signatory. Based upon statements that you made to Omni about not wanting to work for less than what you were making at Nucore and that you believed that Omni and Local 134 were cheating you, Omni made the decision to release you from employment…While the company's official reason for terminating you is listed as a 'reduction in force' Local 134 believes that was done so that you might be able to collect unemployment insurance…Finally, all of the facts surrounding your termination and Local 134's refusal to process a grievance on your behalf are currently under investigation by Region 13 of the National Labor Relations Board as a result of the unfair labor practices charges you have filed. Unless directed to do otherwise by the NLRB, Local 134 will not prosecute a grievance against Omni on your behalf based upon the facts stated above.

(GC Exh. 16).[20]

According to Johnson, his investigation, which resulted in his conclusion that Hopkins' termination was justified, included his discussions with Hopkins and Milbourn, a review of Milbourn's written statements, and Hopkins' "aggressive behavior towards [him]." (Tr. 231–234).

In the Union's position statement to the Board dated August 26, 2014, Rioux did not mention any argument between Hopkins and Milbourn, or that Hopkins was terminated in whole or part due to his use of profanity or insubordination towards his supervisors. Rather, she stated that he was terminated "due to the fact that he demanded to be paid a wage rate that was higher than the one set forth under the collective-bargaining agreement that he was working under, and because he had displayed a "poor work ethic." (GC Exh. 17). She explained Local 134's position that Hopkins was not really laid off, but terminated.

[20] Johnson confirmed in his testimony that he had provided this information to Rioux.

Omni maintained in its position statement to the Board, dated September 17, 2014, that Hopkins resigned his employment with Omni "because it was his belief he should have been paid higher wages under his Union contract." It further stated that Omni "accepted his resignation and thereafter, as a favor to Mr. Hopkins converted the resignation to a layoff based on a reduction in force." The same statement also provided in part that,

> [Hopkins] became angry, shouting at the owner of the Company and informed the Company he would not work for the wages set forth in the Agreement and left work. The Company accepted his resignation, but as a courtesy to the Charging Party (who then requested to return to work) they converted the resignation to a layoff as they really had no need for his services due to a reduction in force which then allowed Charging Party to apply for overtime. The Company informed the Union of this decision on June 25, 2014.

(GC Exh. 18**).** Omni's statement also fails to mention that Hopkins cursed at Milbourn; it also ignores the credited testimony that Milbourn discharged Hopkins.

In sum, crediting Hopkins over others, I find that he truly believed that Omni and the Union had executed a MA, and did not discover they had not done so until June 2014; he was terminated, and did not resign or refuse to return to work, in the course of questioning the terms and conditions of his contract; and he did not yell, scream, or use profanity during his encounters with Milbourn and Johnson. In addition, I find that Johnson did not interview him, tell him the various reasons for his discharge, or give him an opportunity to respond to the charges lodged against him.[21]

III. DISCUSSION AND ANALYSIS

A. Respondent Omni Violated Section 8(a)(1) of the Act When It Discharged Hopkins for Engaging in Protected Concerted Activity

Employers who discharge employees for engaging in protected concerted activity violate Section 8(a)(1) of the Act. The complaint alleges that Respondent Omni violated Section 8(a)(1) when it terminated Hopkins for engaging in protected concerted activity. The General Counsel contends that Omni's unlawful termination was based solely on his protected and concerted efforts to enforce his collective-bargaining agreement. Omni, on the other hand, argues that Hopkins attempted to enforce the wrong contract which amounted to nothing more than a personal gripe over the denial of wages to which he was not entitled. Omni also asserts that if Hopkins' activity is found to be protected, he lost the protection of the Act because of his

[21] A credibility determination may rely on a variety of factors, including the context of the witness testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group,* 339 NLRB 303, 305 (2003); *Daikichi Sushi,* 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group,* 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions--indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi,* 335 NLRB at 622.

insubordinate, aggressive behavior, as well as his declaration that he would not work for fewer wages and benefits .

Based on the credibility findings previously made and those discussed below, I have determined that Hopkins' actions were concerted and protected, and that Omni terminated him because of those actions, in violation of the Act. In doing so, I also find that Hopkins did not, in the course of that protected activity, forfeit the protection of the Act.

In *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984), the Supreme Court approved the Board's longstanding doctrine set forth in *Interboro Contractors*, 157 NLRB 1295 (1966), enfd., 388 F.2d 495 (2d Cir. 1967). In *Interboro*, the Board established that an employee engages in protected concerted activity when he or she, acting alone, relies on and asserts a right conferred through a collective-bargaining agreement. The Supreme Court accepted the Board's reasoning that the assertion of such a right "is an extension of the concerted action that produced the agreement," and therefore a single employee's invocation of that right generally affects all employees covered by the agreement negotiated on their behalf. The Court found that "[t]his type of generalized effect, as our cases have demonstrated, is sufficient to bring the actions of an individual employee within the 'mutual aid or protection' standard [set forth in Section 7 of the Act], regardless of whether the employee has his own interests most immediately in mind." *NLRB v. City Disposal Systems*, supra at 829 (citing *Bunny Bros. Construction Co.*, 139 NLRB 1516, 1519 (1962) and *Interboro Contractors*, supra at 1298). See also, *Tillford Contractors*, 317 NLRB 68, 68–69 (1995).

The Supreme Court also emphasized the Board's intent in *Interboro* to mitigate the potential inequality that exists throughout the duration of the employer-employee relationship, and stated:

> Moreover, by applying § 7 to the actions of individual employees invoking their rights under a collective-bargaining agreement, the *Interboro* doctrine preserves the integrity of the entire collective-bargaining process; for by invoking a right grounded in a collective-bargaining agreement, the employee makes that right a reality, and breathes life, not only into the promises contained in the collective-bargaining agreement, but also the entire process envisioned by Congress as the means by which to achieve industrial peace.

Id. at 835–836. The Court also found that,

> The rationale of the *Interboro* doctrine compels the conclusion that an honest and reasonable invocation of a collectively bargained right constitutes concerted activity, regardless of whether the employee turns out to have been correct in his belief that his right was violated . . . No one would suggest, for instance, that the filing of a grievance is concerted only if the grievance turns out to be meritorious. As long as the grievance is based on an honest and reasonable belief that a right had been violated, its filing is a concerted activity because it is an integral part of the process by which the collective-bargaining agreement is enforced. The same is true of other methods by which an employee enforces the agreement.

Id. at 840–841.

Based on the credibility findings in this decision, I conclude that Hopkins' belief that he was working for Omni under the MA was reasonable and honest. It appears that the Union and Omni knowingly misled him into believing that he would be working under an agreement that would include not only the same wage rate, but also the same fringe benefits that he enjoyed at Nucore.[22] This would include any raises and increases in benefits under the agreement, or any revisions or renegotiation of the agreement. It is inconceivable at best that Hopkins would have left his job at Nucore to work for Omni had he known that he would be relinquishing a much more favorable wage and benefits package. Indeed, as Johnson pointed out, the MA contained the highest tier of wages and benefits, while the LMA contained the lowest. It is equally beyond belief that Hopkins, who was shocked and dismayed in June 2014 to learn his employer and his exclusive collective-bargaining representative had signed a less lucrative contract and wage and benefits package, would have been so content and agreeable with the LMA in the Fall/Winter of 2013 had Omni and/or the Union actually disclosed its terms.

It was under those circumstances, that upon learning for the first time in June 2014 that he had not received the expected raise under the new MA, Hopkins began to invoke his rights under the agreement between Omni and the Union. When Omni and the Union finally made him aware that they had signed the LMA, and of its less favorable terms, he continued to demand the wage and benefits package to which he believed he was entitled, and was terminated in the course of doing so. I find that pursuant to the *Interboro* doctrine, adopted by the Supreme Court, those attempts constituted concerted activity protected under the Act. I further find that since Hopkins was terminated while asserting his rights, and thereby engaging in protected concerted activity, that Omni violated Section (a) (1) of the Act.

B. Omni's Affirmative (and Other) Defenses

I understand that Omni and the Union had no obligation to have Hopkins ratify, or otherwise accept, their standalone agreement. However, his ratification would not have been a prerequisite for exercising his rights. Nor would my findings here, as Omni insists, undermine the Union's authority as the exclusive collective-bargaining representative of its employees.

I reject Omni's argument that *Interboro* and *City Disposal* are inapplicable here because Hopkins tried to invoke terms not included in the LMA—or, in other words, terms of a contract not negotiated by the Union. In doing so, I find that Hopkins, who honestly and reasonably believed his contractual rights were violated, need not have been correct in his interpretation of the contract in order to invoke his rights under the contract. I further find that Board and Supreme Court rationale extends to the unique circumstances in this case, in which Hopkins truly and reasonably believed that Omni and the Union entered into another collective-bargaining agreement.

Further, I find that Hopkins not only asserted rights that he believed he had under the MA, but also reasonably questioned Milbourn about the scope of work he performed under the

[22] Even had Omni and the Union unintentionally misled him, Hopkins nevertheless honestly and reasonably believed he was working under the MA.

LMA during the same encounter that led to his discharge. Likewise, pursuant to *City Disposal*, it matters not whether Hopkins was correct about his understanding of the LMA's scope of work as long as it was honest and reasonable.[23]

Omni asserts that Hopkins' actions would not have been concerted under the *Interboro* doctrine because he was the only Local 134 employee who worked for Omni at the time. This argument is contrary to the Board's explanation that, "[w]hen an employee makes an attempt to enforce a collective-bargaining agreement, he is acting in the interest of all employees covered by the contract. It has long been held that such activity is concerted and protected under the Act." *Tillford Contractors*, supra, citing *Interboro,* 157 NLRB 1295 (1966). First, Omni (and the Union) knew when it signed the LMA and agreed to its terms that Hopkins was its only Local 134 employee. In following Omni's rationale, Hopkins would not have been protected under any circumstances, including attempts to enforce the terms of the LMA if, for example, Omni had decided not to pay him wages or overtime, or had him working outside the scope of the contract. Second, when it entered into the LMA with the Union, Omni signed onto a collectively-bargained agreement and agreed to its terms and conditions already negotiated by the Union on behalf of similarly situated employees who worked for various other employers who initially or subsequently signed onto the LMA as did Omni. This is evident by language in the LMA referring to "[c]ontractors" who enter into the agreement, and by Johnson's explanation of the various prenegotiated "B" agreements to which Omni could have become signatory. Thus, signing onto such an agreement does not absolve Omni from its responsibilities to Hopkins or to any other employees it might hire under the LMA.

Next, I reject Omni's argument that Hopkins' activities, if protected and concerted, lose the protection of the Act because of his alleged combative behavior, yelling, and use of profanity on June 18. I agree that the Court in *City Disposal* recognized that, "[t]he fact that an activity is concerted, however, does not necessarily mean that an employee can engage in the activity with impunity. An employee may engage in concerted activity in such an abusive manner that he loses the protection of § 7." In addition, the Board has long held that disciplinary action for conduct protected by the Act violates Section 8(a)(1) of the Act unless the employee's actions were so threatening, egregious, or opprobrious as to cause him to lose that protection. *Nor-Cal Beverage Co.*, 330 NLRB 610, 611 fn. 5 (2000). The credited evidence shows that Hopkins did not engage in such alleged yelling and cursing, or any other behavior that would have cost him protection of the Act. Even had I found that Hopkins had used the term "fucking" in describing how the Respondents and their agents had been "screwing" or misleading him, and in accusing them of lying to and cheating him, I still would not have found that he forfeited protection under the Act. It is well settled that some profanity and even defiance must be tolerated during confrontations over contractual rights. See, for example, *NLRB v. Chelsea Laboratories*, 825 F.2d 680, 683 (2d Cir. 1987) (protection not lost because grievance presented in a rude and disrespectful manner); *Severance Tool Industries*, 301 NLRB 1166, 1169 (1991) (protection not lost when employee raised his voice at respondent's president and called him a "son of a bitch");

[23] I credit Hopkins' testimony, which was somewhat corroborated by Wagner's, that his work involved more than just changing light bulbs from a crane (as told by Milbourn) or that performed inside of the light fixture (as told to him by Johnson). For example, it also involved fixing bad underground between two light poles (digging up and pulling wire between poles), and other work that he honestly and reasonably believed to be outside the scope of the LMA.

Winston-Salem Journal, 341 NLRB 124, 125–127 (2004) (protection not lost when employee called his supervisor a "bastard" and "redneck son-of-a-bitch").

Therefore, I find that Respondent Omni discharged Hopkins for engaging in protected concerted activity in violation of 8(a)(1) of the Act, and that he did not in the course of that protected activity, engage in any conduct that caused him to lose the Act's protection. *Fresenius USA Mfg.*, 358 NLRB No. 138, slip op. at 4 (2012); *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979).[24]

Both Omni and the General Counsel also analyze these allegations under the frame work set forth in *Wright Line*, 251 NLRB 1083, enfd., 662 F.2d 899 (1st Cir.), cert. denied 455 U.S. 989 (1982).[25] However, *Wright Line* is inapplicable in this case, because a review of the credible evidence and the reasons set forth by Omni for Hopkins' termination show that he was terminated in the course of asserting his rights under the LMA and the agreement under which he honestly and reasonably believed he worked. Both Omni and the Union admitted that a reduction in force layoff was not the real reason for Hopkins' discharge. Omni's other reasons for terminating Hopkins—his continued insistence that he was due a raise; his alleged combative behavior; yelling, and swearing at his supervisor; and his alleged declaration that he would not work for the unfavorable wages and benefits package under the LMA—were inextricably intertwined with his insistence on having Omni honor rights under both the LMA and the MA. Therefore, given my finding on Omni's 8(a)(1) violation, I need not pass on the General Counsel's alternative dual-motivation, retaliation theory that Hopkins' discharge violated Section 8(a)(3) of the Act. See *Aluminum Co. of America*, 338 NLRB 20, 22 (2002) (dual-motive analysis inappropriate where there was a causal connection between alleged protected activity and resulting discipline). See also *Kingsbury, Inc.*, 355 NLRB 1195 (2010); *La-Z-Boy Midwest,* 340 NLRB 80 (2003).

C. The Union Violated Section 8(b)(1)(A) of the Act When it Breached its Duty of Fair Representation

The General Counsel alleges that the Union breached its duty to fairly represent Hopkins when it failed to file a grievance on his behalf, and in doing so violated Section 8(b)(1)(A) of the Act. A breach of this duty occurs when a union's conduct is "arbitrary, discriminatory, or in bad faith" *Vaca v. Sipes*, 386 U.S. 171, 190–191, 207 (1967). In *Airline Pilot's Assn. v. O'Neill*, 499 U.S. 65, 66 (1991), the Supreme Court clarified the nature of a union's duty, extending it to all union activities, and holding that its "actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness,' as to be irrational."[26] Thus, the law clearly affords unions a broad range of discretion in carrying out its representational duties, and an individual employee does not have

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[24] Omni cites several cases in support of its arguments, but they can be distinguished based on the factual findings in this decision. For example, *Media General Operations, Inc., d/b/a the Tampa Tribune & Richard Banos*, 346 NLRB 369, 371 (2006) and *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964) did not involve an employee asserting his rights under a collective-bargaining agreement.

[25] The General Counsel poses this as an alternative argument.

[26] It is also clear that the duty of fair representation extends to the investigation and representation of a grievance. *Hines v. Anchor Motor Freight*, 424 U.S. 554 (1976).

an absolute right to compel arbitration or have a grievance filed on his behalf. *Vaca*, supra at 191. In addition, the Board has established that "[m]ere negligence, poor judgment, or ineptitude in grievance handling are insufficient to establish a breach of the duty of fair representation." *Service Employees Int'l. Union, Local 579 (Beverly Manor Convalescent Center)*, 229 NLRB 692, (1977); *King Soopers, Inc.*, 222 NLRB 1011 (1976); *Truck Drivers, Oil Drivers and Filling Station and Platform Workers, Local No. 705 (Associated Transport, Inc.)*, 209 NLRB 292, 304 (1974). Similarly, a union does not violate the duty of fair representation where it refuses to process a grievance pursuant to a reasonable interpretation of the collective-bargaining agreement and/or a good-faith evaluation as to the merits of the complaint. In addition, the duty does not require that every possible option be exercised or that the union provide perfect advocacy. *Teamsters Local 814 (Beth Israel Medical),* 281 NLRB 1130, 1146–1147 (1986).

However, the Board has established that in the exercise of that discretion, a union must still act in "good faith, with honesty of purpose, and free from reliance on impermissible consideration." *P.P.G. Industries*, 229 NLRB 713 (1977). In *Teamsters Local 355,* 229 NLRB 1319 (1977), enfd. 597 F.2d 388 (4th Cir. 1979), the Board explained that, "the issue here is not whether the Respondent discharged its obligations with maximum skill and adeptness, but whether, in undertaking its efforts, it dealt fairly." And, the Court in *Vaca v. Sipes* explicitly held that a union will breach its duty of fair representation when it has "arbitrarily ignored a meritorious grievance or processed it in a perfunctory fashion." *Vaca*, supra.

Based on the proven facts, I find that the Union clearly acted in bad faith when it failed to file a grievance on Hopkins' behalf, and dismiss the Union's arguments to the contrary.

First, I reject the Union's argument that it sufficiently investigated Hopkins' termination. Although Hopkins told Johnson that he had been terminated, I gave credence to his testimony that Johnson never returned his telephone call, or replied to his emails until the July 1 email. Nor did he apprise Johnson of the charges made by Milbourn and Omni in support of his discharge. Johnson's recollection of his discussion with Hopkins on June 19 was actually supportive of Hopkins' testimony that Johnson cut the conversation short before he could provide the details of his encounter with Milbourn. However, the evidence shows that Johnson had already presumed that Omni was justified in its decision to terminate Hopkins. When Johnson talked to Milbourn on June 19, he instantly sided with him, and advised him that Hopkins' termination was valid due to insubordinate conduct, and later, Chwala thanked Johnson for his assistance with this matter. (GC Exh. 26). In essence, Johnson made up his mind about Hopkins' fate without relating to Hopkins the charges against him (i.e., insubordination, aggressive conduct, swearing, yelling, and refusal to continue working for less money), and failed to give Hopkins an opportunity to tell his side of the story. I understand that the law does not require a union to interview all parties involved or to try to resolve all inconsistencies in deciding whether or not to file a grievance, but it does require an honest, fair, and real attempt to at least interview the discharged employee to whom he has a duty to represent. See *Newport News Shipbuilding & Dry Dock*, 236 NLRB 1470, 1471 (1978) (union agreed with employer's decision to terminate before it interviewed the grievant).

Next, I disagree with the Union's argument that it was up to Hopkins to investigate and find out why he was terminated, or to defend or give additional details about alleged conduct of which he was unaware. It is difficult to believe that Hopkins, given his zealous quest to ascertain

what happened with his contract and finally the status of his grievance, would not have defended his actions in his emails to the Union had he been apprised of Omni's allegations. Instead, I agree with the General Counsel that the Union had every reason not to assist Hopkins with his grievance (and never intended to do so) and not to keep him informed.[27] Rather, Johnson was incensed that Hopkins continued to assert his rights and question why the Union and Omni had misled him, and he made sure that he supported Omni in sustaining Hopkins' termination. He did so with a sham investigation and what otherwise would have been an altruistic act of ensuring that Hopkins would be able to obtain unemployment benefits. Johnson also emphatically insisted that the Union could have filed a grievance on a reduction in force layoff, but his testimony in this regard was inconsistent with business agent Finn's September 2 email explanation to Hopkins that the Union did not file a grievance because he was laid off due to a reduction in force. (GC Exh. 15).

I have considered all of the Union's arguments and cases cited in support thereof, and conclude that they are not applicable here where the evidence supports a conclusion that it breached its duty of fair representation. Based on all of the credited evidence in this case, I find that the Union failed to investigate or proceed with a grievance on Hopkins' behalf, and that its actions in doing so "[transcend] the concept of 'mere negligence' and 'ineptness.' *Teamsters Local 814 (Beth Israel Med.)*, 281 NLRB 1130, 1149 (1986). I further find that the Union's actions were perfunctory, and in light of the evidence, exceeded a wide range of reasonableness such that they were arbitrary and irrational.

Accordingly, I find that the Union breached its duty of fair representation when it failed to file a grievance on Hopkins' behalf, and in doing so, violated Section 8(b)(1)(A) of the Act.

CONCLUSIONS OF LAW

1. Respondent Omni is an employer who has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent Omni, by discharging Hopkins because of his protected concerted activity, has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. Respondent Union, by failing and refusing to file a grievance on Hopkins' behalf in connection with his discharge, and thereby breaching its duty of fair representation, has engaged in unfair labor practices within the meaning of Sections 8(b)(1)(A) of the Act.

[27] Additionally, a union may not willfully misinform a grievant concerning the action being taken on his case. *Security Personnel (Church Charity)*, 267 NLRB 974 (1983). Similarly, the duty of fair representation also imposes a duty not to "purposely keep [an employee] uninformed" about his grievance. Id. at 1150; Groves-Granite, 229 NLRB 56 (1977).

REMEDY

Having found that both Respondent Omni and Respondent Union have engaged in certain unfair labor practices, I find that they must be ordered to cease and desist therefrom and to take certain affirmative actions designed to effectuate the purposes and policies of the Act.[28]

Having found that Respondent Omni unlawfully discharged Hopkins, I find that it must be ordered to offer him immediate and full reinstatement to his former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and to make him whole for any loss of earnings he may have suffered as a result of the discrimination against him, by payment of a sum equal to that which he would normally have earned from the date of the discrimination, June 18, 2014, to the date of Respondent's offer of reinstatement. The amount of back pay due shall be computed according to the Board's policy set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), plus interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987). Respondent Omni shall also remove from its files, including Hopkins' personnel files, any references to his discharge, and shall therefore notify Hopkins in writing that this has been done and that the discharge will not be used against him in any way.

Respondent Omni shall, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including electronic copies of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of the order.

Respondent Omni shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate Hopkins for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Latino Express, Inc.,* 359 NLRB No. 44 (2012).

Respondent Omni shall post an appropriate notice as described in the order and the attached Appendix A.

Having found that Respondent Union violated Section 8(b)(1)(A) of the Act by failing and refusing to properly represent Hopkins after he was discharged on June 18, 2014, I find that it must be ordered that Respondent Union refrain from so failing and refusing to properly represent its member employees, including Hopkins.

Respondent Union must post an appropriate notice, as described in the order and attached Appendix B.

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[28] Since I have found Respondent Omni liable for Hopkins' unlawful termination, it is not necessary to require, as requested in the complaint, that Respondent Union seek reinstatement, or in the alternative, a grievance on Hopkins' behalf, or that it make Hopkins whole for any loss of earnings or benefits suffered from the time of his discharge on June 18, 2014, until such time as he would be reinstated by Omni or obtains substantially equivalent employment. (GC Exh. 1(e)).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[29]

ORDER

A. The Respondent, Omni Commercial Lighting, of Elgin, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Discharging, reprimanding, or otherwise discriminating against/or otherwise taking adverse action against employees because of their protective concerted activities, including their attempts to enforce rights under their collective-bargaining agreements.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes of the Act:

(a) Offer Hopkins immediate and full reinstatement to his former or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and to make him whole for any loss of earnings he may have suffered as a result of his unlawful discharge, by payment of a sum equal to that which he would normally have earned from the date of the discrimination, June 18, 2014, to the date of Respondent's offer of reinstatement.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Hopkins, within 3 days thereafter notify him in writing that this has been done and that the discharge will not be used against him in any way.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility at Omni Commercial Lighting, Inc., Elgin, Illinois, copies of the attached notices marked "Appendix

[29] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

A."[30] Copies of Appendix A, on forms provided by the Regional Director for Region 13, after being signed by Respondent Omni's authorized representative, shall be posted by Respondent Omni immediately upon receipt thereof and be maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent Omni customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent Omni to see that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent Omni has gone out of business or closed the facility involved in these proceedings, Respondent Omni shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent Omni at any time since June 18, 2014.

(e) Notify the Regional Director for Region 13, in writing, within 20 days from the date of this Order, what steps Respondent Omni has taken to comply herewith.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent Omni has taken to comply.

B. Respondent Union, International Brotherhood of Electrical Workers Local 134, of Chicago, Illinois, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing and refusing to carry out its duty to fairly represent its employees/members in the processing of their grievances.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action:

(a) Within 14 days after service by the Region, post at its business office in Chicago, Illinois, meeting halls, or other places where it customarily posts notices, signed copies of the attached notice marked "Appendix B."[31] Copies of said notice, on forms provided by the Regional Director for Region 13, shall, after being signed by Respondent Union's authorized representative, be posted by Respondent Union immediately upon receipt thereof and be maintained for 60 consecutive days thereafter. Additional copies of said appendix B shall be

[30] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[31] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

duly signed by an authorized representative of Respondent Union and furnished to the said Regional Director for transmission to Respondent Omni for posting by Respondent Employer in accordance with the Order directed to Respondent Employer above.

(b) Notify the Regional Director for Region 13, in writing, within 20 days from the date of this Order, what steps Respondent Union has taken to comply herewith.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 8, 2015

Donna N. Dawson
Administrative Law Judge

APPENDIX A

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL not discharge, reprimand, or otherwise discriminate against our employees because they engage in protected concerted activities.

WE WILL not in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Anthony Hopkins full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Anthony Hopkins whole for any loss of earnings or other benefits he may have suffered as a result of his unlawful discharge on June 18, 2014, less any net interim earnings, and plus interest in the manner set forth in the remedy section of this decision and order.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL compensate Anthony Hopkins for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year. Within 14 days from the date of the Order, remove from its files, including Anthony Hopkins' personnel file, any reference to his unlawful discharge, and within 3 days thereafter notify Hopkins in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent Omni has taken to comply.

OMNI COMMERCIAL LIGHTING, INC.
(Employer)

Dated: _____ **By:** _____
(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

The Rookery Building, 209 South LaSalle Street, Suite 900, Chicago, IL 60604-1443
(312) 353-7570, Hours: 8:30 a.m. to 5:00 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/13-CA-134425 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (312)353-7170

APPENDIX B
NOTICE TO MEMBERS
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain on your behalf with your employer
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT restrain or coerce member employees, including Anthony Hopkins or other employees of Omni Commercial Lighting, Inc., in the exercise of their rights guaranteed by Section 7 of the National Labor Relations Act by failing and refusing to fairly represent them in the handling of their grievances.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent Union has taken to comply.

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS LOCAL 134
(Labor Organization)

Dated: _____ **By:** _____
(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

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